

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
STEVE C. ABRAHAMSON,  
  
Defendant.

NO. CR-06-0089-LRS

**ORDER DENYING DEFENDANT'S  
MOTION FOR A JUDGMENT OF  
ACQUITTAL OR IN THE  
ALTERNATIVE MOTION FOR A NEW  
TRIAL**

**BEFORE THE COURT** is Defendant's Motion for ACQUITTAL (**Ct. Rec. 138**), filed July 10, 2007. Defendant asked for and received an extension of time to file memoranda in support of the motion (**Ct. Rec. 142**). Defendant filed his memoranda in support of the motion on August 22, 2007. (**Ct. Rec. 157**). The government filed its response to the motion on August 31, 2007 (**Ct. Rec. 159**). Defendant filed his reply in support of the motion on September 10, 2007 (**Ct. Rec. 159**). The motion was also noted to be heard without oral argument on September 10, 2007. As such, Defendant's motion is now ripe for review.

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1                                   **I. BACKGROUND**

2           The jury returned a verdict of guilty against Mr. Abrahamson for  
3 violation of 18 U.S.C. §113(a)(7) and 1153 on June 28, 2007.

4 Defendant filed his motion within seven days of the jury's verdict as  
5 required by Fed. R. 29c.

6                                   **II. LEGAL STANDARD**

7           The standard for evaluating a Rule 29 motion is the same as  
8 the standard used in evaluating whether the evidence is  
9 sufficient to sustain the verdict: whether viewing all the  
10 evidence in the light most favorable to the government, any  
11 rational jury could find the defendant guilty beyond a reasonable  
12 doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *See United*  
13 *States v. Christian*, 942 F.2d 363, 366 (9th Cir. 1991). On appeal,  
14 the court will uphold a conviction if the evidence, including evidence  
15 that was erroneously admitted, was sufficient to sustain the verdict.  
16 *Lockhardt v. Nelson*, 488 U.S. 33, 40-42 (1988).

17                                   **III. DISCUSSION**

18           In his motion, the Defendant argues that "viewing all the  
19 evidence in the light most favorable to the government, any rational  
20 jury could only find that Mr. Abrahamson was guilty beyond a  
21 reasonable doubt of striking, beating or wounding his child; the  
22 lesser included offense and not the greater offense of assault  
23 resulting in substantial bodily injury to his child who had not yet  
24 attained the age of sixteen." Ct. Rec. 157 at 2. In essence,  
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1 Defendant is arguing that the jury should have found him guilty of  
2 causing bodily injury but not substantial bodily injury. See  
3 Defendant's Reply (Ct. Rec. 159 at 2).

4 In support of this assertion, Defendant states that the only  
5 relevant evidence presented to the jury that related to whether the  
6 child sustained bodily injury came by way of medical testimony through  
7 three doctors: Dr. Katherine Whipple for the government, and Doctors  
8 James Brinkman and Geoffrey Julian for the Defendant. Defendant  
9 believes that because the Defendant's experts found that the minor  
10 child in question was not substantially injured, the jury should have  
11 also found that the child was not substantially injured. As noted by  
12 Defendant, Dr. Catherine Whipple testified that in her opinion "I  
13 think there was significant and substantial injury caused - -." See  
14 Transcript of Jury Trial Proceedings at 173 and 226. It is undisputed  
15 that the injury to the child was not permanent. On redirect  
16 examination, Dr. Whipple testified that there was "significant"  
17 swelling and bruising to the external part of the internal auditory  
18 canal such to the extent she could not visualize the tympanic  
19 membrane. Transcript at 217. Defendant criticizes the doctor for not  
20 testing the child's hearing when the ear canal could not be  
21 visualized, and characterizes the doctor's conclusions as "mere  
22 conjecture." Ct. Rec. 157 at 4. Defendant also argues that his  
23 experts were more qualified. *Id* at 5. For these reasons, the  
24 Defendant argues that the weight of the evidence produced through  
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1 expert testimony proves that the child's injuries were not substantial  
2 but only superficial." *Id* at 6.

3 Moreover, Defendant argues that statutory language defining  
4 substantial bodily injury is unconstitutionally vague as applied in  
5 this case arguing that confusion abounded as to what the term meant.  
6 *Id* at 7-8.

7 A statute is vague as applied if it either fails to give the  
8 person of ordinary intelligence a reasonable opportunity to know what  
9 is prohibited, so that he may act accordingly or fails to provide  
10 explicit standards for those who apply them." *United States v.*  
11 *Sandsness*, 988 F.2d 970, 972 (9<sup>th</sup> Cir. 1993). However, the Court  
12 agrees with the government that the Ninth Circuit case law is well  
13 settled that in a prosecution for assault under 18 U.S.C. § 113, the  
14 question of whether the assault resulted in serious bodily injury, is  
15 a question for the jury to decide. *U.S. v. Fitzgerald*, 882 F.2d 397,  
16 399 n. 2 (9<sup>th</sup> Cir. 1989) ("existence and definition of serious bodily  
17 injury is primarily a jury question dependent upon an evaluation of  
18 all the circumstances of all the injuries.") While the Ninth Circuit  
19 has addressed this issue most often in terms of serious bodily injury  
20 instead of substantial bodily injury, the analysis would be the same  
21 in either case.  
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23 There is sufficient evidence to support a conviction if, "viewing  
24 the evidence in the light most favorable to the prosecution, any  
25 rational trier of fact could have found the essential elements of the  
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1 crime beyond a reasonable doubt." *U.S. v. Duran*, 189 F.3d 1071, 1078  
2 (9<sup>th</sup> Cir. 1999). The Ninth Circuit has directed that the jury should  
3 use its common sense in determining whether injuries sustained meet  
4 the statutorily required level." *U.S. v. Johnson*, 637 F.3d 1224, 1246  
5 (9<sup>th</sup> Cir. 1980). See also *U.S. v. Bernard*, 795 F.2d 749, 755 n.10 (9<sup>th</sup>  
6 Cir. 1986). In the case at bar, the record is clear that the child  
7 was struck multiple times, that the child suffered deep bruising to  
8 his face and cheek as well as behind the ear, and swelling of the ear  
9 canal to the point that it was swollen shut causing temporary hearing  
10 loss. The jury heard all of the evidence and the evidence supports  
11 the finding of guilt that the jury returned. For this reason, the  
12 Court will not substitute its judgment for that of the jury, which is  
13 charged with the duty of deciding whether the facts of this case taken  
14 together demonstrate that the minor child suffered a substantial  
15 injury.  
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17 For the foregoing reasons, Defendant's Motion for acquittal or in  
18 the Alternative for a New Trial (**Ct. Rec. 138**) is **DENIED**.

19 **IT IS SO ORDERED.** The District Court Executive is directed to  
20 enter this order and to provide copies to all counsel.  
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22 **DATED** this 12th day of October, 2007.

23 **s/Lonny R. Suko**

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25 LONNY R. SUKO  
26 UNITED STATES DISTRICT JUDGE